



Claimant filed a claim for benefits under the Act, averring he sustained a work-related binaural hearing impairment. After claimant's claim was transferred to the Office of Administrative Law Judges, the parties reached an agreement. Consequently, in an

Order issued on September 9, 2015, the administrative law judge remanded the case to the district director for appropriate action.

Claimant's counsel subsequently filed a petition seeking an attorney's fee of \$1,776, representing 4.29 hours of attorney work at an hourly rate of \$400 and one-half hour of paralegal work at an hourly rate of \$120, for work before the administrative law judge. The administrative law judge approved an attorney's fee, payable by employer, totaling \$1,215, representing 3.9 hours of attorney work at \$300 per hour and one-half hour of paralegal work at \$90 per hour.

On appeal, claimant's counsel challenges the administrative law judge's reduction of his requested hourly rates.<sup>1</sup> Employer responds, urging affirmance of the administrative law judge's decision.

We agree with claimant's counsel that the administrative law judge's analysis of the hourly rates cannot be affirmed. For the reasons that follow, we remand the case for further consideration.

The Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). The Court has also held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; *see also Kenny A.*, 559 U.S. at 551. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation. *Stanhope v. Electric Boat Corp.*, 44 BRBS 107, 108 (2010); *see also Blum*, 465 U.S. at 896 n.11; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4<sup>th</sup> Cir. 2010).

In support of his request for hourly rates of \$400 for attorney work and \$120 for paralegal work, claimant's counsel submitted evidence of rates he and his paralegals received in prior longshore cases, along with evidence to support an upward adjustment of those figures to reflect current rates. Specifically, counsel submitted fee awards of

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<sup>1</sup> We affirm the administrative law judge's reduction in attorney time by .39 hours as it is unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

administrative law judges in *Williams v. Huntington Ingalls Industries, Inc.*, Case No. 2012-LHC-00819 (2013), awarding counsel an hourly rate of \$324 for attorney work and an hourly rate of \$95 for paralegal work performed between February 13, 2012 and January 11, 2013, and *Hailey v. URS Washington Corp.*, Case No. 2011-LHC-00140 (2012), awarding counsel an hourly rate of \$315 for attorney work and an hourly rate of \$95 for paralegal work performed between October 12, 2010 and August 1, 2011.<sup>2</sup> Counsel additionally relied upon the Laffey Matrix and increases in the Consumer Price Index and federal locality pay in support of his claim that the rates awarded in prior years should be increased. Employer filed objections to counsel's fee petition.

In addressing counsel's requested hourly rates, the administrative law judge did not address the fee awards in *Williams* and *Hailey* submitted to support the fee request. Order at 2, 4. The administrative law judge rejected counsel's reliance on the Laffey Matrix<sup>3</sup> and increases in the federal locality pay rate and CPI to upwardly adjust hourly rates that he had previously been awarded, as she found that this evidence does not correlate to a change in the market for legal services in claimant's counsel's locale. The administrative law judge noted, moreover, that counsel did not introduce any affidavits from other counsel in the area or other evidence that would support his requested hourly rate of \$400. *Id.* at 4-6. The administrative law judge relied on "attorney fee petitions submitted by experienced attorneys representing Claimant's [sic] in the Eastern District of Virginia in other Longshore cases before the court," to find that an hourly rate of \$300 for attorney work represents "the prevailing rate" in claimant's counsel's locale for "highly competent counsel practicing under the [Act]." *Id.* at 6. Consequently, the administrative law judge concluded that claimant's counsel's "attorney fee petition is not consistent with the local attorneys practicing in the local area with similar experience." *Id.* Similarly, without further elaboration, the administrative law judge found that \$90

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<sup>2</sup> Counsel also relied upon the Board's award of a \$350 hourly rate in *Green v. Ceres Marine Terminals, Inc.*, BRB Nos. 09-0294/A (Mar. 30, 2010). As claimant's award of benefits in *Green* was reversed on appeal, *see Green v. Ceres Marine Terminals, Inc.*, 656 F.3d 235, 45 BRBS 67(CRT) (4<sup>th</sup> Cir. 2011), counsel did not receive an attorney's fee in that case. Consequently, the *Green* Order cannot serve as a basis for setting a market rate in this case.

<sup>3</sup> Contrary to counsel's contention, the administrative law judge was not required to use the Laffey Matrix when determining a reasonable fee within the relevant geographic market. *See Holiday*, 591 F.3d at 229, 43 BRBS at 72(CRT) (citing *Grissom v. The Mills Corp.*, 549 F.3d 313 (4<sup>th</sup> Cir. 2008) (wherein the court recognized that the Laffey Matrix is not binding in cases arising in the United States District Court for the Eastern District of Virginia)).

per hour “is an appropriate rate for claimant’s counsel’s paralegal’s work based on experience and the prevailing rate for other paralegals practicing under the [Act].” *Id.*

The administrative law judge, however, did not identify “the attorney fee petitions” previously presented to the court by “attorneys practicing in the local area with similar experience” which led her to conclude that \$300 per hour for attorney services and \$90 per hour for paralegal services are the prevailing rates in the relevant area. Order at 6. Moreover, the administrative law judge was not presented with any evidence awarding those specific rates, nor did she cite any other cases awarding those rates. Thus, the administrative law judge’s conclusion is arbitrary, as we are unable to review the basis for her findings. Consequently, we conclude that, at present, the fee award cannot be affirmed. *Holiday*, 591 F.3d 219, 228-229, 43 BRBS 67, 71-72(CRT); *see generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 1041, 29 BRBS 121, 122-123(CRT) (9<sup>th</sup> Cir. 1995).

Prior fee awards may constitute “inferential evidence” of a prevailing market rate in cases arising under the Act. *Eastern Associated Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561 (4<sup>th</sup> Cir. 2013); *Cox*, 602 F.3d at 290; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Newport News Shipbuilding & Dry Dock v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004); *Stanhope*, 44 BRBS 107. In this case, while the administrative law judge strongly suggested that affidavits would have been helpful in her calculation of an appropriate hourly rate, such evidence is not required to set the prevailing market rate. *Cox*, 602 F.3d at 289-290.<sup>4</sup> Furthermore, the rate should be based on current, rather than historical, market conditions. *See generally Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9<sup>th</sup> Cir. 2009); *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff’d mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App’x 912 (9<sup>th</sup> Cir. 2011). Thus, counsel’s evidence of rates he previously received for work in the Hampton Roads area, which was not considered by the administrative law judge, may constitute sufficient evidence of a prevailing market rate at the time he received those rates. *Gosnell*, 724 F.3d at 572-574. In view of the absence of evidence to support the administrative law judge’s hourly rate determinations, and her failure to consider

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<sup>4</sup> In *Cox*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, “recognized a range of sources” that could provide evidence to support an hourly rate determination, including: 1) evidence of fees the attorney received in the past; 2) affidavits of other local attorneys who are familiar with the applicant’s skills and the type of work in the relevant community; and/or 3) evidence of rates awarded in other administrative proceedings of similar complexity. 602 F.3d at 289-290.

counsel's evidence of prior awarded hourly rates, we vacate the hourly rate determinations and remand the case for further consideration of this issue. On remand, the administrative law judge must reconsider counsel's evidence of fee awards in other cases and provide the specific basis for her conclusions regarding the market rates for the services of counsel and paralegals.<sup>5</sup> *Gosnell*, 724 F.3d 561; *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT).

Accordingly, the administrative law judge's Order Awarding Attorney Fee is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>5</sup> In her decision, the administrative law judge noted that employer offered a quote from a 2012 study authored by the Old Dominion University Economics Department addressing attorneys' billing rates in the Hampton Roads area following the 2008 recession. *See* Order at 3. The portion quoted states that billing rates decreased after the recession because of an increase in the supply of legal services. Emp. Obj. at 2-3. It does not appear that employer offered the actual report to the administrative law judge. To the extent the administrative law judge may have relied on this report, we note that she did not consider if it remains probative in light of the fact that counsel's services were performed between July 21 and September 14, 2015.